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Benjamin William Hawkes v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–214–09 OF 2017 (K)
ROHANA YUSUF PCA, AZAHAR CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
C 13 AUGUST 2020

Criminal Procedure — Evidence — Exhibit — Whether prosecution's failure to tender CCTV recording as exhibit at trial irreparably prejudiced accused and D *denied him of fair trial — Whether investigating officer explained recording was not adduced in evidence because it was unclear — Whether court would not invoke adverse inference against prosecution absent evidence that it deliberately withheld or suppressed material evidence — Whether since accused himself could have applied to court for production/inspection of the recording but failed to do so* E *he could not complain he had been denied of fair trial — Whether non-production of recording did not breach s 51A(1)(b) of Criminal Procedure Code as recording was neither a 'document' envisaged under that section nor was it intended to be used by prosecution as part of its evidence*

F Shortly after arriving at the Langkawi International Airport on a flight from abroad, the appellant, a South African, was having his trolley bag scanned at the customs checkpoint when the scanner revealed the presence of a suspicious substance in the bag. On the customs officer's instructions, the appellant opened the bag to remove its contents which included a document bag. A G re-scanning showed that the suspicious substance was within the document bag. While the scanning process was underway, the appellant walked off and exited the airport building leaving his passport, boarding pass and two cellphones behind. He was soon tracked down by an airport security officer and brought back to the customs checkpoint from where he was taken to a room H where his trolley bag and its contents were thoroughly checked by several customs officers. They finally found two packets containing methamphetamine concealed within the walls of the document bag. The appellant denied any knowledge about the drugs. He was subsequently charged in the High Court with trafficking in 1,598.3g of the methamphetamine I contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. At the trial, the investigating officer ('PW9') disclosed during cross-examination that he had obtained a CCTV recording of the events that took place on the day in question but because it was unclear and not useful for his investigations the recording was not adduced as evidence at the trial nor was it disclosed to the

defence. In making his defence to the charge, the appellant said that the reason why he walked out of the building while the scanning was going on was to see if his friend, whom he had arranged to meet at the airport, had arrived. The appellant contended that if the prosecution had produced the CCTV recording it would have supported his version of the events including his contention that: (a) the trolley bag was never wrapped in blue plastic as claimed by the prosecution; (b) the trolley bag did not have any lock; (c) when he was found by a security officer outside the building and brought back to the scanning machine, he found that his trolley bag had already been partially opened; (d) the trolley and document bags were not scanned twice as claimed by the prosecution; and (e) he did not know what happened to his bags and possessions while he was detained in a separate room in handcuffs. The appellant relied upon the non-production of the CCTV recording as his sole ground of appeal in his instant appeal against conviction and sentence on the trafficking charge. The trial judge had rejected the appellant's version of events and ruled that the prosecution's non-production of the CCTV recording had not affected its case in any way. The judge held that even without the recording, the prosecution had established that the appellant was in possession of the impugned drugs at the material time. The judge was also satisfied with PW9's explanation why the CCTV recording was not tendered in evidence and refused to invoke adverse inference against the prosecution over its non-production. In affirming the conviction and sentence, the Court of Appeal ('COA') held that the prosecution's failure to produce the CCTV recording was not fatal to its case and would have only strengthened its case if it had been produced. At the hearing of the instant appeal, the appellant argued that the prosecution's failure to produce the CCTV recording breached s 51A(1)(b) of the Criminal Procedure Code ('the CPC') and had denied him of a fair trial.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) **(per Zabariah Yusof FCJ, majority)** There was no merit in the appellant's contention that the prosecution had a duty to produce the CCTV footage once PW9 had referred to it under cross-examination. Section 51A(1)(b) of the CPC provided that 'The prosecution shall before the commencement of the trial deliver to the accused ... a copy of any document which would be tendered as part of the evidence for the prosecution'. The CCTV footage was never tendered as part of the prosecution's case simply because it was not clear and was of no assistance to the prosecution as explained by PW9 in his testimony. As the CCTV footage was never intended to be part of the prosecution's evidence, the prosecution had no duty under s 51A(1)(b) to deliver the footage to the appellant before the commencement of the trial. If the footage was unclear and could not assist the prosecution, how could it assist the defence's case? Therefore, it could not be said that the CCTV footage was

A evidence that was favourable to the defence's case (see paras 56–59).

(2) **(per Zabariah Yusof FCJ, majority)** The CCTV footage did not fall within the ambit of 'documents' as envisaged under s 51A(1)(b) of the CPC. Section 51A of the CPC expressly provided for the disclosure of the first information report, documents or reports which the prosecution intended to tender at trial and the statement of facts favourable to the defence (unless its supply was contrary to public interest) only. It was an automatic disclosure by the prosecution of only those three types of 'documents' as compared to s 51 which provided for discovery upon request. Except for what was provided for under s 51A of the CPC, the accused was not entitled to discovery or inspection of evidence or material in the prosecution's possession before the commencement of the trial (see para 66).

(3) **(per Zabariah Yusof FCJ, majority)** The appellant could have applied to court for the CCTV footage to be produced or tendered in evidence or for the footage to be inspected by the defence but there was no such application during the trial. Such omission on the appellant's part constituted a waiver of his right to such evidence and, consequently, he could not complain that he had been denied of a fair trial (see para 62).

(4) **(per Zabariah Yusof FCJ, majority)** There was no merit in the appellant's contention that the prosecution's failure to disclose the CCTV footage had caused him irreparable prejudice or had denied him of a fair trial. There was no basis to say the prosecution had withheld or suppressed evidence because: (a) PW9's evidence that the CCTV footage was unclear was never disputed or challenged; hence, that evidence was deemed to be accepted; and (b) it was never suggested by the defence to PW9 that the prosecution had withheld or suppressed any exculpatory or material evidence in the CCTV footage that was favourable to the defence (see paras 61 & 73).

(5) **(per Zabariah Yusof FCJ, majority)** The appellant had not shown any appealable error either in the trial court's decision or in the decision of the COA to warrant appellate intervention (see para 75).

[Bahasa Malaysia summary

Sejurus selepas tiba di Lapangan Terbang Antarabangsa Langkawi dengan penerbangan dari luar negara, perayu, seorang warganegara Afrika Selatan, sedang diimbas bagasi trolinya di pusat pemeriksaan Kastam apabila pengimbas itu menunjukkan kehadiran bahan mencurigakan dalam bagasi itu. Atas arahan pegawai kastam, perayu telah membuka bagasi itu untuk mengeluarkan kandungannya yang termasuk satu beg dokumen. Imbasan semula menunjukkan bahawa bahan mencurigakan itu berada dalam beg dokumen itu. Semasa proses pengimbasan sedang dijalani, perayu berlalu pergi dan keluar bangunan lapangan terbang meninggalkan passport, pas masuk dan

dua telefon bimbitnya. Dia kemudian dapat dikesan oleh pegawai keselamatan lapangan terbang dan dibawa balik ke pusat pemeriksaan kastam itu dari mana dia telah dibawa ke bilik di mana bagasi trolinya dan kandungannya diperiksa dengan teliti oleh beberapa pegawai kastam. Mereka akhirnya menjumpai dua bungkusan yang mengandungi methamphetamine disembunyikan pada dinding pelapik beg dokumen itu. Perayu menafikan apa-apa pengetahuan tentang dadah itu. Dia kemudian telah dituduh di Mahkamah Tinggi kerana mengedar 1,598.3g methamphetamine yang melanggar s 39B(1)(a) Akta Dadah Berbahaya 1952. Semasa perbicaraan, pegawai penyiasat ('PW9') mendedahkan semasa pemeriksaan balas bahawa dia telah memperoleh rakaman CCTV tentang kejadian yang berlaku pada hari yang dipersoalkan tetapi oleh kerana ia tidak jelas dan tidak berguna untuk siasatannya rakaman itu tidak dikemukakan sebagai keterangan semasa perbicaraan mahu pun ia tidak didedahan kepada pembelaan. Dalam membuat pembelaannya terhadap pertuduhan itu, perayu menyatakan bahawa sebab kenapa dia berjalan keluar bangunan itu semasa imbasan sedang berlaku adalah untuk berjumpa kawannya, yang telah diatur olehnya untuk berjumpa di lapangan terbang itu, yang telah sampai. Perayu menegaskan bahawa jika pendakwaan mengemukakan rakaman CCTV itu ia dapat menyokong versinya berhubung kejadian itu termasuk hujahnya bahawa: (a) bagasi troli itu tidak dibalut dalam palstik biru sebagaimana didakwa oeh pendakwaan; (b) bagasi troli itu tidak mempunyai apa-apa kunci; (c) apabila dia dijumpai oleh pegawai keselamatan di luar bangunan dan dibawa balik ke mesin imbasan, dia mendapati bagasi trolinya telahpun dibuka sebahagiannya; (d) bagasi troli dan beg dokumen itu tidak diimbas dua kali seperti yang didakwa ole pendakwaan; (e) dia tidak mengetahui apa yang berlaku kepada beg-beg dan barang milikannya semasa dia ditahan dalam bilik berasingan dengan tangannya digari. Perayu bergantung kepada rakaman CCTV yang tidak dikemukakan sebagai satu-satunya alasan rayuannya dalam rayuannya ini terhadap sabitan dan hukuman berhubung pertuduhan pengedaran itu. Hakim pericaraan telah menolak versi kejadian perayu dan memutuskan bahawa rakaman CCTV yang tidak dikemukakan oleh pendakwaan tidak menjejaskan kesnya dalam apa cara pun. Hakim memutuskan bahawa meskipun tanpa rakaman, pendakwaan telah membuktikan bahawa perayu mempunyai milikan dadah yang dipersoalkan pada masa matan. Hakim juga berpuas hati dengan penjelasan PW9 kenapa rakaman CCTV itu tidak ditenderkan sebagai keterangan dan enggan menggunakan inferens bertentangan terhadap pendakwaan berhubung ianya tidak dikemukakan itu. Dalam mengesahkan sabitan dan hukuman, Mahkamah Rayuan ('MR') telah memutuskan bahawa kegagalan pendakwaan untuk mengemukakan rakaman CCTV tidak memudaratkan kesnya dan hanya mengukuhkan kesnya jika ia dikemukakan. Semasa rayuan ini didengar, perayu berhujah bahawa kegagalan pendakwaan untuk mengemukakan rakaman CCTV telah melanggar s 51A(1)(b) Kanun Tatacara Jenayah ('KTJ') dan telah menafikannya perbicaraan yang adil.

Diputuskan, melalui majoriti (Nallini Pathmanathan HMP, menentang) menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) **(oleh Zabariah Yusof HMP, majoriti)** Tiada merit dalam hujah perayu bahawa pendakwaan mempunyai kewajipan untuk mengemukakan rakaman CCTV itu selepas PW9 merujuk kepadanya di bawah pemerisaan balas. Seksyen 51A(1)(b) KTJ memperuntukkan bahawa 'The prosecution shall before the commencement of the trial deliver to the accused ... a copy of any document which would be tendered as part of the evidence for the prosecution'. Rakaman CCTV itu tidak pernah dtenderkan sebagai sebahagian kes pendakwaan semata-mata kerana ia tidak jelas dan tidak dapat membantu pendakwaan sebagaimana dijelaskan oleh PW9 dalam keterangannya. Oleh kerana rakaman CCTV itu tidak pernah dimaksudkan sebagai sebahagian daripada keterangan pendakwaan, pendakwaan tiada kewajipan di bawah s 51A(1)(b) untuk menyerahkan rakaman itu kepada perayu sebelum bermulanya perbicaraan. Jika rakaman itu tidak jelas dan tidak membantu pendakwaan, bagaimana ia boleh membantu kes pembelaan? Oleh itu, ia tidak boleh dikatakan bahawa rakaman CCTV itu sebagai keterangan yang menyebelahi kes pembelaan (lihat perenggan 56–59).

(2) **(oleh Zabariah Yusof HMP, majoriti)** Rakaman CCTV itu tidak terjatuh dalam skop 'documents' sepertimana termaktub di bawah s 51A(1)(b) KTJ. Seksyen 51A KTJ dengan jelas memperuntukkan untuk penzahiran Laporan Maklumat Pertama, dokumen atau laporan yang pendakwaan berniat untuk tender semasa perbicaraan dan kenyataan fakta yang menyebelahi pihak pembelaan (kecuali jika bekalannya bertentangan dengan kepentingan awam) sahaja). Ia adalah penzahiran automatik oleh pendakwaan untuk hanya tiga jenis 'documents' tersebut jika dibandingkan kepada s 51 yang memperuntukkan untuk penemuan atas permintaan. Kecuali apa yang telah diperuntukkan di bawah s 51A KTJ, tertuduh tidak berjak untuk penemuan atau pemeriksaan keterangan atau material dalam milikan pendakwaan sebelum perbicaraan bermula (lihat perenggan 66).

(3) **(oleh Zabariah Yusof HMP, majoriti)** Perayu boleh memohon kepada mahkamah untuk rakaman CCTV dikemukakan atau ditenderkan sebagai keterangan atau agar rakaman itu diperiksa oleh pembelaan tetapi tiada apa-apa permohnan dibuat semasa perbicaraan itu. Peninggalan sedemikian di pihak perayu merupakan satu penepian haknya kepada keterangan tersebut dan, akhirnya, dia tidak boleh mengadu bahawa dia dinafikan perbicaraan yang adil (lihat perenggan 62).

(4) **(oleh Zabariah Yusof HMP, majoriti)** Tiada merit dalam hujah perayu bahawa kegagalan pendakwaan untuk menzahirkan rakaman telah menyebabkannya prasangka yang tidak baik atau menafikannya perbicaraan yang adil. Tiada asas untuk mengatakan pendakwaan telah

menahan atau menindas keterangan kerana: (a) keterangan PW9 bahawa rakaman CCTV itu tidak jelas tidak pernah dipertikaikan atai dicabar; justeru, keterangan itu dianggap boleh diterima; dan (b) ia tidak pernah dicadangan oleh pembelaan kepada PW9 bahawa pendakwaan telah menahan atau menindas apa-apa keterangan material atau pengecualian dalam rakaman CCTV itu yang menyebelahi pembelaan (lihat perenggan 61 & 73).

(5) **(oleh Zabariah Yusof HMP, majoriti)** Perayu tidak menunjukkan apa-apa kesilapan yang boleh dirayu sama ada dalam keputusan mahkamah perbicaraan atau dalam keputusan MR untuk mewajarkan campur tangan mahkamah rayuan (lihat perenggan 75).]

Cases referred to

Cheong Seok Leng v PP [1988] 2 MLJ 481 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 CLJ 265, FC (refd)
Easterday v R (2003) 143 A Crim R 154, SC (refd)
Hee Nyuk Fook v PP [1988] 2 MLJ 360, SC (folld)
Kuruma, Son of Kaniu v The Queen [1955] AC 197, PC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (folld)
Luke Nnaemeka Ugwu lwn Pendakwa Raya [2015] MLJU 2041; [2016] 2 CLJ 400, CA (refd)
Manu Sharma v State (NCT of Delhi) (2010) 6 SCC 1, SC (refd)
Miss Rossarin Nuekaew v PP [2017] 5 MLJ 1; [2017] 8 CLJ 503, FC (folld)
PP v Goh Thor Kiah [1952] 1 MLJ 91b (folld)
PP v Mohd Fazil bin Awaludin [2009] 8 MLJ 579; [2009] 2 CLJ 862, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim [2010] 2 MLJ 353; [2010] 4 CLJ 331, CA (refd)
R v Stinchcombe [1991] 3 SCR 326, SC (refd)
Ragg v Magistrates' Court of Victoria (2008) 179 A Crim R 568, SC (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513; [2003] 1 CLJ 61, FC (refd)
Regina v H and others [2004] 2 AC 134, HL (refd)
Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393; [2007] 4 CLJ 1, FC (refd)
See Kek Chuan v PP [2013] 6 MLJ 885; [2013] 6 CLJ 98, CA (refd)
Shabalala and Others v Attorney General of the Transvaal and Another [1996] 1 LRC 207 (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471, FC (refd)
Shiv Kumar v Hakum Chand and another 1999 (7) SCC 467, SC (refd)
VK Sasikala v State (2012) 9 SCC 771, SC (refd)

Legislation referred to

Criminal Procedure Code ss 51, 51A, 51A(1), (1)(b), (1)(c), (3), (4), (5), 158(ii), 173A, 314(ii), 399, 402A, 402B, 422
Dangerous Drugs Act 1952 ss 37(da), 39B, First Schedule
Evidence Act 1950 s 114(g)
Federal Constitution arts 5(1), 8, 8(1)
Interpretation Acts 1948 and 1967 s 17A
Rules of High Court 1980 O 42 r 12

Appeal from: Criminal Appeal No B-05(M)-218–06 of 2016 (Court of Appeal, Putrajaya)

Editorial Note: Please refer to *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 for the decision on the issue of the constitutionality of the death sentence.

Gopal Sri Ram (Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi and Mohd Nor Hafidzuddin Yusoff with him) (Rashid Zulkifli) for the appellant.
Nik Suhaimi Nik Sulaiman (Umar Saifuddin Jaafar, Mangaikarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron, Asmah Musa and Muhammad Azmi Mashudn with him) (Attorney General's Chambers) for the respondent.

Zabariah Yusof FCJ:

[1] This is the majority judgment of this court. The appellant, a South African national was charged as follows:

> Bahawa kamu pada 21 Julai 2013, jam lebih kurang 9.00 malam, di Balai Ketibaan, Lapangan Terbang Antarabangsa Langkawi, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1,598.3 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The case went for full trial and the learned judicial commissioner ('JC') held that the prosecution had proven a prima facie case against the appellant. The learned JC found that the appellant was in actual possession of the drugs and relied on the presumption under s 37(da) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking.

[3] The Court of Appeal affirmed the decision of the learned JC. Dissatisfied, the appellant appealed to the Federal Court. Before us the appellant raised two issues, namely the failure by the prosecution during the trial to adduce the CCTV footage outside the airport building on the material

date, is fatal to the prosecution's case and the constitutionality of the death sentence imposed on him. This judgment will only deal with the first issue. The issue on the constitutionality of the death sentence will be dealt with in a separate judgment by my learned brother and sister Judges, Azahar Mohamed, CJM and Nallini Pathmanathan, FCJ.

BACKGROUND

[4] On 21 July 2013 around 8pm, the appellant landed at the Langkawi International Airport (airport) from Johannesburg via Singapore. The appellant cleared the immigration checkpoint and proceeded to claim his trolley bag ('P8') at the baggage carousel at the airport.

[5] At the material time, PW4, customs officer was on duty operating the scanner machine at the airport. PW4 scanned P8 and the scan showed a bright orange item in it. PW4 instructed the appellant to cut open the blue plastic covering of P8 and requested that he opened P8 which had a combination lock. In doing so, the appellant removed the clothes in P8, revealing a black document bag ('P22'). P22 was scanned by the same scanning machine and this time the same bright orange item appeared on the scanner machine.

[6] While all these were going on, the appellant walked away towards the airport exit leaving his passport, boarding pass and two handphones at the table by the scanner machine.

[7] Several officers from the enforcement division of the customs department then arrived at the airport, including Mustafa al Bakri bin Wahid ('PW7'). By that time the appellant was apprehended and was in handcuffs and was sitting down.

[8] PW7 inspected P8 and found a blue plastic wrapper, some clothes and P22. After the inspection, the appellant was then brought to the enforcement office together with P8. At the enforcement office PW7 and several other officers continued to examine P8. PW7 searched the document bag, P22 in the presence of the appellant. There was nothing inside but it was heavy. He inspected the two side walls of P22 and felt that there could be something inside it. The bag and P22 were brought to head office for further search on P22. At the head office, PW7 did a thorough search on P22 in the presence of the appellant. This search led to the discovery of two black rectangle packets (P58A and P58B) in the side walls of P22. These two packets were found to contain crystals substances which upon preliminary testing were found to be methamphetamine. The appellant denied knowing about the impugned drugs

A when asked by PW7. The appellant allegedly cried when the two packets were found in P22. The items were seized, marked and photographs were duly taken.

B **[9]** PW7 handed over the exhibits to the investigating officer, PW9 on 22 July 2013. PW9 sent P58A and P58B to the government chemist, PW3 for analysis and the results showed that the crystalline substances found in P58A and P58B were 804.6 and 793.7g of methamphetamine respectively, which is dangerous drug listed under the First Schedule of the DDA.

C **[10]** Vide letter dated 22 July 2013, PW9 wrote to Malaysia Airport Bhd (MAB) ('P75'), to request for the relevant CCTV footage from the airport. However, PW9 said that he had wrongly cited the wrong date when he made the request for the CCTV footage. In any event, on 25 July 2013, PW9 D watched the CCTV footage at MAB's office. PW9 said in his testimony that the footage showed a white man was arrested outside the airport building, but PW9 could not identify the white man in the footage. PW9 obtained the footage from MAB but the said footage was not tendered in court during the trial nor disclosed to the defence.

E **[11]** It was in evidence that the appellant had tried to communicate with PW4 before the appellant left the customs inspection area but PW4 could not comprehend what the appellant was trying to say.

F **[12]** The appellant informed PW7 that the document bag did not belong to him. PW7 was questioned on this during cross examination.

THE DEFENCE CASE

G **[13]** In his unsworn statement, the appellant said that he went to Langkawi on holiday. He had been to Langkawi before. On the material date, the appellant arranged for a friend, Jimmy to meet him at the airport.

H **[14]** The appellant admitted that he had a document bag inside the trolley bag which he was carrying. He said that he has not seen the trolley bag, P8 between the time when it was checked in at Johannesburg until the point when he retrieved it from the carousel at Langkawi airport.

I **[15]** The appellant denied that the trolley bag was wrapped or covered in a blue plastic and further denied that it had a padlock. It is not clear what was the type of lock used, whether a 'combination key lock' (as PW4 described it) or 'padlock' (as the appellant described it), referred to the same thing. But it was asserted by the appellant that P8 has no lock at all.

[16] The appellant was asked to open his bag at the scanner machine at the customs check point. As far as communication between the officer and the appellant was concerned, it was very minimal and most of the time it was communication using sign language and nodding the head rather than speaking in English.

[17] The appellant said that he had informed the customs officer that he wished to go and get his friend, Jimmy, who was supposedly waiting for him outside the airport building. The customs officer purportedly nodded his head indicating his agreement for the appellant to go and get his friend. However, he could not explain why he started running away from the exit of the building until the edge of the car park area. After the appellant went out to get his friend, who could not be located, the appellant returned back with PW5, the security officer.

[18] When the appellant returned after his failure to locate Jimmy, he saw that P8 was partially opened. The appellant was handcuffed and taken to another room. P8 was brought to the room later.

[19] The appellant said that the customs officers produced a document bag, P22 which looked similar to the one which he had put in P8 earlier. However the documents that were in the document bag were missing. The appellant denied that the drugs which were in the document bag was his. He said that he has no knowledge of the drugs and certainly it was not his. He denied that P8 and P22 were scanned twice by the custom officers.

[20] The appellant contended that the CCTV footage would support his account of events at the airport. The defence however did not call any witness.

[21] In the appeal before us, the appellant raised only one issue as his bone of contention, namely, on the failure by the prosecution to adduce the CCTV footage which would support his narrative of what took place at the airport. Hence in this judgment we will only address the point of the failure by the prosecution to adduce the CCTV footage of the events that transpired when he went out to search for his friend, Jimmy:

(a) that when he was brought back into the airport building by PW5 after he had gone out from the airport searching for his friend and could not locate him, he found that his bag, P8 was partly opened;

(b) when he went out of the airport building earlier P8 was not closed;

(c) P8 was not wrapped in blue plastic;

(d) when he was brought back to the inspection counter, he was handcuffed and directed to sit in a separate room. It was only later that P8 together with the contents were brought into the room by a custom officer;

(e) P22 looks similar to his document bag but he claimed that his documents inside P22 were missing; and

(f) he denied that P8 was scanned twice as claimed by the prosecution.

[22] The appellant asserted that his story could only be confirmed by the CCTV recording. In light of his narrative of what transpired it is crucial that the CCTV footage be produced by the prosecution to ascertain as to the truth of what was said by the appellant.

FINDINGS OF THE HIGH COURT

[23] It is the defence of the appellant that if the CCTV footage was adduced in court, it would confirm his version of the story as the truth, namely, it could explain his trolley bag, P8 was not wrapped in blue plastic wrapper, P8 was scanned once, and that he was not brought back to the inspection counter after he returned from the parking area.

[24] As to the CCTV footage, the learned JC in his grounds had, inter alia, said that:

> [128] In regard to the failure to adduce the CCTV footage in the prosecution's case, I was of the opinion that the evidence of the CCTV footage was merely a supporting evidence in support of the prosecution's case. The failure to tender the CCTV footage could not affect the prosecution's case in establishing the accused was in possession of the incriminating drugs (contained in P58 (A &B) which were found concealed in P22, where P22 was received from P8. SP 4's evidence that P 22 was found inside P8 was supported by SP 5's testimony. Their testimonies were not discredited.
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> ...
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> [130] I was of the opinion that there was no necessity for the prosecution to produce the CCTV footage as an additional or corroborative evidence in the prosecution's case. As a matter of fact, SP 9 had explained to the court that the CCTV footage was not helpful in his investigation of the case. As such, he need not adduce the CCTV footage as evidence. Further, the prosecution also need not call any officer from MAB to explain why the footage was not helpful in his investigation. On this score, I could not make any inference which could favour the accused's case on the failure to adduce the CCTV footage in the prosecution's case (see *Mehmet Ucaner Oktay v Pendakwa Raya* [2016] MLJU 1688; [2016] 1 LNS 4; *Ediawe Eshilama Clinton v Pendakwa Raya* [2015] MLJU 362; [2015] 9 CLJ 169; *Dilbar Nazarova v Public Prosecutor* [2015] MLJU 677; [2015] 1 LNS 926). I was not satisfied that the CCTV footage could be a material evidence in the prosecution's case in that s 114(g) of the Evidence Act 1950 should be invoked in the given facts of this case. The

analysis here applies both at the close of the prosecution's case and end of the trial. A

[25] At the end of the defence case, the learned JC held that the appellant had failed to raise a reasonable doubt on the prosecution's case. The defence also failed to rebut the presumption under s 37(da) of the DDA. As for the appellant's unsworn statement, the learned JC did not accept the appellant's narrative of events. B

FINDINGS OF THE COURT OF APPEAL

C

[26] The Court of Appeal affirmed the decision of the learned JC. The Court of Appeal held, inter alia, that:

(a) the CCTV footage, if clear, would only serve as an additional corroborative evidence to the prosecution;

D

(b) the CCTV footage would only strengthened the prosecution's case if it was produced;

(c) the failure on the part of the prosecution to disclose and deliver the CCTV footage was not fatal to the case of the prosecution; and

E

(d) the High Court's order of conviction and sentence was affirmed.

BEFORE THE FEDERAL COURT

Submission by the appellant

F

[27] The appellant contended that both the High Court and the Court of Appeal had erred in failing to find that the prosecution was in breach of s 51A(1)(b) of the Criminal Procedure Code ('the CPC') when it failed to disclose or produce the relevant CCTV footage, recording the events at the airport on 21 July 2013. As a result the appellant's right to a fair trial has been denied. G

[28] The appellant contended that the drugs were not in his black document bag when he came through customs, as the document bag which was produced in court as P22 was not his. Hence the CCTV footage is a relevant and crucial piece of evidence for the defence. H

[29] When PW9 was cross examined, he confirmed that he had seen the CCTV footage on the events of 25 July 2013, however he claimed that the footage was not clear. I

[30] The appellant contended that the learned JC made findings against the appellant without viewing the CCTV footage and this has caused prejudice to

A the appellant. The appellant lost the opportunity to view the CCTV footage and thus he has been denied the right to natural justice vis a vis the denial of a fair trial.

B **[31]** It is submitted by the appellant that the prosecution was under an obligation under s 51A(1)(b) of the CPC to produce the CCTV footage once PW9 had made reference to it under cross examination. The obligation was said to be a continuing one.

C **[32]** The appellant submitted that cl (1) of art 5 of the Federal Constitution ('the FC') guarantees the right to life and personal liberty to a person. The right to life and personal liberty can only be deprived 'save in accordance with law'. The word 'save in accordance with law' include the rights to a fair trial in both procedure and substance (refer to *Shamim Reza bin Abdul Samad v Public*
D *Prosecutor* [2011] 1 MLJ 471, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301).

[33] It is further submitted that cl (1) of art 5 and art 8 of the FC respectively and s 51A of the CPC placed an implied obligation upon the prosecution to
E make a fair disclosure as long as the trial is still ongoing. The appellant referred to *Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1 where the Indian Supreme Court held that a wide duty of disclosure exist as part of a constitutional right to a fair trial:

F > The liberty of an accused cannot be interfered with except under due process of law. The expression 'due process of law' shall deem to include fairness in trial. The court (sic 'Code') gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and Prosecutor) to make
G > a fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that
H > document should also be disclosed to the accused.

[34] Hence given that the appellant in the present case has the right to a fair trial, the issue is whether the prosecution has breached that right by the non-disclosure of the CCTV footage under s 51A of the CPC.

I

[35] Counsel for the appellant referred to authorities from various jurisdictions which demonstrates the wide duty of disclosure which exists as part of a constitutional right to a fair trial. Amongst them are Indian authorities of *Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1 at para 218; *Shiv*

Kumar v Hakum Chand and another 1999 (7) SCC 467 at para 13; *VK Sasikala v State* (2012) 9 SCC 771 at para 21; Australian authorities of *Easterday v R* (2003) 143 A Crim R 154 at p 188; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568 at p 589; Canadian authorities of *R v Stinchcombe* [1991] 3 SCR 326 at p 336, South African case of *Shabalala and Others v Attorney General of the Transvaal and Another* [1996] 1 LRC 207 at p 226. Not to mention authorities from our own jurisdiction in *See Kek Chuan v Public Prosecutor* [2013] 6 MLJ 885; [2013] 6 CLJ 98 and *Luke Nnaemeka Ugwu lwn Pendakwa Raya* [2015] MLJU 2041; [2016] 2 CLJ 400 at p 408 which had affirmed and applied the equality of arms principle. The right of equality before the courts was stated in the Supreme Court of Australia in *Ragg v Magistrates' Court of Victoria*:

> The right to equality before the courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.

[36] The appellant submitted that the principle of equality of arms is crucial to the fundamental rights of an accused under cl (1) of art 5 and cl (1) of art 8 of the FC. This is consistent with domestic law.

[37] Hence it was submitted by the appellant, that contrary to the observation made by the Court of Appeal, the learned JC was in breach of s 51A(1)(b) of the CPC when it failed to produce to the appellant during the High Court proceedings, the CCTV footage.

[38] The appellant also referred to *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 8 MLJ 579; [2009] 2 CLJ 862 where it was held that under s 51A of the CPC the prosecution owes a general duty to deliver certain documents which may assist the appellant in his defence. Section 51A of the CPC has been described as having been 'designed to ensure that there is a fair system for the disclosure, especially of unused material which may assist the defence in the timely preparation and presentation of its case and enables the court to focus on all the important issues in the trial so that the trial will not be halted or delayed'.

Submission by the respondent

[39] The respondent submitted that the prosecution has never breached the right to a fair trial by the non-disclosure of the CCTV footage under s 51A of the CPC mainly on the following reasons:

(a) there is no duty for the prosecution to deliver the CCTV footage before the commencement of trial under s 51A(1)(b) of the CPC because the

prosecution did not tender the said CCTV footage as exhibit to form part of the prosecution's evidence; and

(b) there is no evidence that the said CCTV footage was in the appellant's favor and thus there is no duty on the prosecution to disclose the same as facts favorable to the accused under s 51A(1)(c) of the CPC.

OUR FINDINGS

[40] Section 51A of the CPC provides:

(1) The prosecution *shall* before the commencement of the trial deliver to the accused the following *documents*:

(a) A *copy of the information made under section 107* relating to the commission of the offence to which the accused is charged, if any;

(b) A *copy of any document* which would be tendered as part of the evidence for the prosecution; and

(c) A *written statement of facts favourable to the defence* of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

(3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).

(4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.

(5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused-

(a) A reasonable time to examine the document; and

(b) To recall or re-summon and examine any witness in relation to the document. (Emphasis added.)

The effect of the word 'shall' in s 51A (1) of the CPC

[41] The crucial issue for consideration hinges on the effect to be given to the word 'shall' as appearing in s 51A(1) of the CPC. Is the court obliged to construe the word 'shall' as mandatory in this case.

[42] The court has the occasion to consider on the significance and effect of the word 'shall' in *Public Prosecutor v Goh Thor Kiah* [1952] 1 MLJ 91b. The respondent was charged with possession of 20 packets of opium. He pleaded guilty and was discharged under s 173A of the CPC. When the appeal came before Taylor J, no notice of an appeal had been served on the respondent. The

public prosecutor applied under s 314(ii) of the CPC for a notice to be issued; this was done and it was returned unserved. Section 314(ii) reads:

> (ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

The prosecution applied under the said section for the appeal to be heard on its merits in the absence of the respondent and suggested that a more severe sentence should be passed and a warrant issued to enforce it. Taylor J in his judgment said that:

> I think the explanation of the section is this. Originally there was no appeal by the Public Prosecutor; the chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended. I agree that it is a strong thing to construe the word 'shall' as 'may' but I do not go as far as that. In my opinion, having regard to what I believe to be the history of the section, the true construction is: 'shall if the prosecutor is the respondent.' I do not think that the word 'shall', in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word 'shall' must be given a meaning modified to the extent which I have indicated.

Taylor J held that the word 'shall' should not be construed as mandatory as such a construction is plain violation of the fundamental principle audi alteram partem and is wholly opposed to all principles of judicial procedure.

[43] The Supreme Court case in *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360 provides a useful guideline in ascertaining whether the word 'shall' provided in a provision is to be construed as mandatory. It was held that it largely depends on the intention of the legislature, the facts and circumstances of the case and also the injustice that it would bring in interpreting the provision in a certain way. It was in relation to s 158(ii) of the CPC. The Supreme Court held that:

> The question that arises is whether section 158 (ii) is mandatory or directory. In our view, the word 'shall' appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way of the other (see Interpretation of Statutes, 7th Ed, p 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter

A is imperative or only directory (see *Howard v Bodington* (1877) 2 PD 203 at p 211).

Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of s 158(ii) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial.

B

[44] This court had interpreted the word 'shall' in O 42 r 12 of the Rules of High Court 1980 as not intended to be so, in the case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156. O 42 r 12 of the Rules of High Court
C 1980 provides:

12. Every judgment debt shall carry interest at the rate of 8 percentum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

D The court held that:

Although the Order is expressed in imperative 'shall', it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the court to order interest under section 11 of the Civil Law Act 1956. We do not
E think that Order 42 rule 12 can override the provision of the Act. This Order can only mean that the court may order interest at 8% if the court thinks that circumstances justify such rate. In no sense must this Order be understood as obliging the court to award interest at 8 % and 8 % only. We cannot therefore accept the submission of counsel for the respondent and as such the award of interest by the learned judge is upheld.

F

[45] Similarly in *Miss Rossarin Nuekaew v Public Prosecutor* [2017] 5 MLJ 1; [2017] 8 CLJ 503 this court held that the imperative 'shall' in s 402B of the CPC is only directory and its non compliance is a mere irregularity and not an
G illegality and therefore curable under s 422 of the CPC. Zulkefli bin Ahmad Makinudin PCA speaking for the Federal Court said that:

25. Applying the test and the principle laid down in *Hee Nyuk Fook*, it is our judgment that the requirement to read aloud the witness statement under subsection 402B(6) of the CPC is only directory and not mandatory.

H

[46] Applying the principles as enunciated in the aforesaid cases, whether the word 'shall' in a particular legislation is mandatory or directory depends upon the intention of the Legislature in question which is ascertained by looking at the whole scope of the statute to be construed. The use of the word 'shall' would
I not by itself make a provision of the Act mandatory. It is to be construed with reference to the scheme of the statute and the context in which it is used. In *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481 at p 489 (Tab 6), Chan Sek Keong JC (as he then was) explained the relevant rules of interpretation to be given to the word 'shall' which appears in legislations as follows:

I now turn to the wording of section 23(1) of the Interpretation Act. Structurally, it is in two parts. The first part provides that 'subsidiary legislation ... *shall*, unless it be otherwise provided ... be published in the Gazette'. Ignoring for the time being the effect of the qualifying clause, the effect of which I shall discuss later, the use of the word 'shall' in a statute to qualify a thing to be done indicates the prima facie intention of the legislature that it must be done, ie it is mandatory. *However, it is not conclusive in every case. In the appropriate context, it may be directory. Whether or not it is mandatory or directory depends on the legislative intent*. How does court ascertain the legislative intent in such a case? The relevant rules of interpretation applicable to an enactment which mandatory in form have been summarized succinctly by Subba Rao J in *State of UP v Babu Ram AIR* [1961] SC 751 at p 765 as follows:

> (29) The relevant rules of interpretation may be briefly stated thus: when a statute uses the word 'shall', prima facie it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the legislature the court may consider, inter alia, the nature or design of the statute, and the consequences which would follow from construing it one way or another, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and above all, whether the object of the legislation will be defeated or furthered. (Emphasis added)

[47] On the scheme of the statute itself (the CPC), it is apposite to note that the said provision in the statute was intended to avoid any unnecessary postponement and delay in a trial, when the defence in a criminal trial seek for postponement purportedly premised on the non receipt of documents which is crucial and necessary in the preparation for the defence of the accused. The provision was never meant to impede the prosecutorial process so as to render inadmissible the tendering of any document which did not comply with s 51A of the CPC.

[48] The purposive rule of interpretation must be adopted in interpreting s 51A of the CPC, pursuant to s 17A of the Interpretation Acts 1948 and 1967 which read as follows:

> 17A Regard to be had to the purpose of the Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[49] It is clearly untenable in this case to allude to the word 'shall' as mandatory, thus stultifying the justice of case, when a document was not delivered to the accused persons before the commencement of the trial.

[50] The scheme of the provision denotes that s 51A of the CPC is fundamentally a procedural provision as opposed to a substantive or evidential provision of the law. The scheme of the Act was explained by the Minister when moving in Parliament for s 51A to be included in the CPC. It was explained that s 51A is merely procedural in nature (refer to *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 8 MLJ 579 at p 593; [2009] 2 CLJ 862 at p 876 wherein the learned judge referred to the speech of the Minister concerned) wherein the intention of its inclusion was to facilitate the speedy disposal of trials without the hassle of trials being postponed due to documents (namely, first information reports, documents which would be tendered as part of the prosecution's case written statements favourable to the accused persons) not being supplied to accused persons before commencement of trials in criminal cases.

[51] In this regard, it is pertinent to note that s 51A of the CPC is not concerned with admissibility issues unlike other sections in the CPC for eg s 402A of the CPC. For comparison, it is useful to refer to s 402A of the CPC which stipulates that:

> 402A Notice to be given of defence of alibi
>
> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused *shall* have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) ...

Under s 402A of the CPC, the word used is 'shall have given notice ...' failure in which, renders the evidence in support of the defence of alibi inadmissible.

[52] Coming back to s 51A of the CPC, if the Legislature was of the view that non-compliance with s 51A of the CPC would affect the admissibility of any evidence, it would have been worded in a similar or like manner as s 402A of the CPC.

[53] Instead Parliament sees it fit to add new sub-ss (3), (4) and (5) to s 51A of the CPC to give discretionary power for the trial court to admit or exclude any document delivered after the commencement of trial.

[54] The concern of s 51A of the CPC appears to be with service and delivery of documents and not with admissibility of evidence. Such being the case, the word 'shall' must be construed, in all circumstances of the case to enable and to assist in the administration of justice rather than to impede it. To construe the word 'shall' as mandatory in this case would be absurd, as the non compliance with s 51A of the CPC would vitiate a trial and would result in allowing a guilty

person to be set free. Further, there is recourse or contingency provided in the said section in the event s 51A of the CPC is not complied with as provided under s 51A(3) of the same.

[55] Hence, a more liberal meaning must be given to the word 'shall' in s 51A of the CPC rather than a rigid interpretation, so as not to curtail the administration of justice in the manner of a case to be carried out.

Whether the non-disclosure of CCTV infringe the principle of right to a fair trial

[56] Reverting back to the complaint by the appellant that the prosecution was under an obligation to produce the CCTV footage once PW9 had made reference to the same under cross-examination. The appellant submitted that this duty of disclosure is a continuing duty.

[57] We do not see the merits of such contention for the following reasons: s 51A(1)(b) of the CPC provides that 'The prosecution shall before the commencement of the trial deliver to the accused ... a copy of any document *which would be tendered as part of the evidence for the prosecution*; and ...'.

[58] The CCTV footage was never tendered as prosecution's exhibit as forming part of the prosecution's case, simply because the footage was not clear and would be of no assistance to the prosecution's case. This can be found in the testimony of the investigation officer (PW9) at p 144 *Jld* 3.

Hence, it is understandable why the CCTV footage has never been intended to be part of the prosecution's exhibits or evidence, and thus, there is no duty on part of the prosecution to deliver such CCTV footage to the appellant before the commencement of trial under s 51A(1)(b) of the CPC.

[59] If the CCTV was unclear and unable to assist the prosecution's case, how could it assist the defence's case. Therefore, it cannot be said that the CCTV footage would be evidence favorable to the defence's case.

[60] It was submitted by the appellant that by failing to produce the CCTV footage after PW9 had made reference to the same during the trial, the appellant was irreparably prejudiced. Instead PW9 had made the decision that the CCTV footage was unclear and therefore it was irrelevant. It was also submitted that although the prosecution is of the opinion that the particular evidence is unnecessary to their case, but it is an entirely different decision-making process from deciding whether to disclose that evidence to the defence. For this the appellant referred to the case of *Regina v H and others* [2004] 2 AC 134 whereby Lord Bingham stated:

> Fairness ordinarily requires that any material held by the prosecution, which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. *Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure*. The golden rule is that full disclosure of such material should be made. (Emphasis added.)

[61] We are of the view that, to apply lock, stock and barrel what was said by Lord Bingham in the context of our case is misconceived. Lord Bingham was referring to 'withholding of evidence from disclosure'. From the facts of our present case, there is no basis to say that the prosecution has withheld or suppressed the evidence of the CCTV footage because:

(a) there was no dispute or challenge on the evidence of PW9 that the CCTV footage was unclear, and as such, this evidence was deemed accepted; and

(b) there was also no suggestion by the appellant to PW9 that any exculpatory and material evidences which are favorable to the defence of the appellant were withheld or suppressed by the prosecution in this CCTV footage by the prosecution.

Due to the fact that there was no basis to say that the prosecution was suppressing or withholding material evidence, adverse inference under s 114(g) of the Evidence Act 1950 could not be invoked against the prosecution.

[62] In addition, the appellant was never prohibited from applying to court for the CCTV footage to be produced or tendered in court or that for the defence to inspect the CCTV footage, after the prosecution had disclosed the existence of the same in the evidence of PW9 during cross examination. This was admitted by counsel for the appellant that there was no such application by the defence during the trial. Such omission on the part of the appellant constitutes a waiver on his right to such evidence and consequently, could not complain subsequently that his right of fair trial has been denied.

The ambit of the duty of disclosure by the PP under s 51A(1)(b) of the CPC

[63] The duty on the prosecution to serve documents to the defence before commencement of the trial is circumscribed within s 51A of the CPC. It provides for automatic discovery of certain documents by accused person *before the commencement of the trial*.

[64] Section 51A(1)(b) of the CPC, which is the specific provision relied upon by the appellant, provides for the delivery to the accused person of *a copy of any document which would be tendered as part of the evidence for the*

prosecution. Section 51A(1)(c) requires the public prosecutor to deliver to the accused a written statement of facts favourable to the defence of the accused. The wording of s 51A is explicit as to what the prosecution is required to supply, namely those documents/statements of fact expressly stipulated therein. The Court of Appeal decision in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2010] 2 MLJ 353; [2010] 4 CLJ 331 has dealt with this issue when it said:

> [57] Learned counsel for the respondent submitted that the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs:
>
> (a) when it would prejudice the respondent's right to a fair trial;
>
> (b) when s.51(A)(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering at trial;
>
> (c) when he failed to take into account that the authenticity of the samples were doubtful and questionable because of tampering by the police.
>
> [58] It was our view that the decision of the learned judge in respect of the original samples and swabs was correct in law as the respondent was not entitled at the pre-trial stage to have the original samples and swabs. With respect to the learned judge's order relating to the slides and pictures we were of the view that the learned judge erred in law in making the order (see Raymond Chia case). *Furthermore the respondent in our view, should not be allowed to fish out for information. (Sohoni's Code of Criminal Procedure, 1973).*
>
> [59] *With regard to the respondent's contention that s 51(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering our answer to that is that s. 51A refers to documents only.* (Emphasis added.)

[65] The decision by the Court of Appeal was affirmed by the Federal Court in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 CLJ 265 wherein Abdull Hamid Embong HMR (as His Lordship was then) said as follows:

> [50] At the close of arguments, learned assisting counsel for the appellant, Dato Param Cumaraswamy, called our attention to a document called the 'General Comment No. 32 of the UN Human Rights Committee, 19th Session'. *We were reminded of the rights to equality before the courts and to a person's right to a fair trial. One feature found in that document is the provision on 'adequate facilities' to be given to an accused person. This includes access to documents and other evidence, including materials that the prosecution 'plans to offer in court against the accused'* (see para 33). (Emphasis added).
>
> [52] N*ow, the words 'plan to offer in court against the accused' which we underscored above have, we think, been put in place when Parliament added s. 51A to the CPC. We need to repeat here s.51A(1)(b) which says*:
>
> *(1) The prosecution shall before the commencement of the trial deliver to the accused:*

A *(b) A copy of any document which would be tendered as part of the evidence of the prosecution;*

In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the General Remarks document of the Hunan Rights Committee that was read to us. Section 51A CPC has, in our opinion, made the battlefield more level, to preserve the 'equality of arms principle', ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[66] Section 51A of the CPC expressly provides for the disclosure of first information report, documents or reports which the prosecution intends to tender at trial and the statement of fact favourable to the defence only, subject to public interest exception. It is an automatic disclosure by the prosecution only to these three types of 'documents' as compared to s 51 of the CPC which provides the discovery upon request. Hence the CCTV footage does not fall within the ambit of 'documents' as envisaged under s 51A(1)(b) of the CPC. This was precisely what was decided in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* in that the Court of Appeal held that the exercise of the discretionary power by the court under s 51 of the CPC with regard to the application at the pre-trial stage has been limited. The court construed the section strictly. Except as what is provided for under s 51A of the CPC the accused is not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial. This decision of the Court of Appeal was affirmed by this court.

[67] The other issue is with regards to the distinction between the provisions which prescribed the manner of the trial, such as ss 399 and 402A of the CPC and the provisions which facilitates the conduct of the trial such as 51A of the CPC. Disregard of the former is fatal to the trial and would at once invalidate the conviction. However, disregard of the latter is not fatal unless the court is satisfied that the accused had been prejudiced. The non compliance with s 51A of the CPC would not statutorily prevent the prosecution from tendering the documents which were not delivered to the accused person before trial as evidence in the course of the trial. Hence it is only procedural and not evidential. It is trite law that even in cases of evidence obtained illegally, its admissibility is unaffected as the issue is actually relevancy. This was explained by Lord Goddard in the Privy Council case of *Kuruma, Son of Kaniu v The Queen* [1955] AC 197:

> the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained.

[68] NS Bindra in his book *Interpretation of Statutes* at p 582 explicitly explained the function of the rules of procedure:

> Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and not hurdles to obstruct pathway to justice. Construction of the rule of procedure which promotes justice and prevents its miscarriage by enabling the court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of permissible construction must be preferred to that which is rigid and negatives the ends of justice. The reason is obvious. Procedure is means to subserve and not rule the cause of justice. A rule of procedure enacted in a statute must, moreover, be liberally construed: so as to lead to the smooth working of the scheme of the statute. It is a general rule relating to the construction of statute that in the absence of an express provision, an adjective law cannot control the provisions of substantive law.

Reference to case laws from other jurisdictions

[69] Counsel for the appellant had referred to case laws from other jurisdictions to fortify his argument on the duty of the prosecution to produce the CCTV footage once PW9 made reference to it and also to disclose the same to the defence.

[70] We are of the view that it is not necessary to refer to other jurisdictions because:

(a) there is no lacunae in the CPC, there is specific provision on disclosure in criminal trials in the CPC, namely ss 51 and 51A; and

(b) our law in this respect is not in pari materia with the jurisdictions referred to by counsel of the appellant.

[71] In fact caution should be exercised in importing common law/laws from other countries where the domestic legislation clearly provided for it. Abdul Hamid Mohamad FC in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513 at p 536; [2003] 1 CLJ 61 at p 88 said that:

> In my view, this court is bound by the provisions of our own Rules and not that of any other country ...
>
> Furthermore, this court should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms part of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s. 3 (1) of the Civil Law Act 1956, must be borne in mind.

[72] Further His Lordship said in *Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393; [2007] 4 CLJ 1 that:

A It is true that the courts, through its decisions try to arrive at a 'fair and just result'. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice.

CONCLUSION

B

[73] Given the aforesaid, there is no merit in the contention of the appellant that the failure of the prosecution to disclose the CCTV footage had caused irreparable prejudice to the appellant and had denied the appellant's right to a fair trial which is a fundamental right under cl (1) of art 5 and cl (1) of art 8 of
C the FC.

[74] The learned JC had evaluated the issue on the failure to adduce CCTV footage in his judgment at pp 43–45 *Jld* 2 and made findings of fact regarding the issue that CCTV was not material evidence and refused to invoke adverse
D inference under s 114(g) of the Evidence Act 1950. His decision was affirmed by the Court of Appeal.

[75] Therefore, we are of the view that there is no appealable error shown by the appellant as to the decision of the learned JC which was affirmed by the
E Court of Appeal which warrants our intervention. We therefore affirm the conviction and sentence under s 39B of the DDA. The appeal is accordingly dismissed.

F **[76]** My learned brother and sister judges in the panel (save and except for Nallini Pathmanathan, FCJ) have read this judgment and have expressed their agreement to it, to form the majority judgment of this court.

Appeal dismissed; conviction and sentence affirmed.

G

Reported by Ashok Kumar

H

I